

1 them, which is gobble up key content. That is
2 a path to get to domination.

3 BY MR. PHILLIPS:

4 Q If I may take you back to your
5 chart for a moment, Dr. Singer?

6 A Sure.

7 Q Can you explain to me what you
8 drew from this chart?

9 A Right. So let's kind of orient
10 ourselves again. So the notion was that
11 here's another efficiency justification.
12 Don't look at how we're treating Tennis
13 Channel. Just look at how our peers are
14 treating Tennis Channel. Okay? And their
15 contention is that their relevant peers, the
16 ones that they like the best, are treating
17 Tennis Channel just like Comcast.

18 And what I say back to that is
19 let's not engage in a cherry-picking exercise
20 in which I get to pick my friend Time-Warner
21 and I hold him out as my proxy for Comcast
22 here. I get to pick my friend Cablevision.

1 Let's just look at the entire
2 sample of MVPDs who are in what I consider to
3 be Comcast peer group. And I'll just say I
4 know that I'm not going to avoid 30 minutes of
5 cross-examination, but I will say that none of
6 these, none of these, MVPDs are perfect
7 proxies for a world in which Comcast is not
8 conflicted through its ownership of Golf and
9 Versus. None of them are perfect. Okay?
10 Everyone has got a wart attached to them.
11 Okay?

12 In the face of that day of mess,
13 the best thing that you can do is look at
14 everybody. Okay? Look at everybody, but
15 don't cherry-pick because I can find my
16 favorites and you can find your favorites.
17 And then we're just going to be yelling at
18 each other all day.

19 What I suggest, the economic and
20 scientific approach is to look at all MVPDs.
21 Okay? And what you find is that when you look
22 at all MVPDs in Comcast's peer group, you take

1 away Comcast, you look at all MVPDs in the
2 peer group, the average penetration rate for
3 Tennis Channel is , nearly times
4 the penetration rate that Comcast affords
5 Tennis Channel.

6 And so I just cannot accept the
7 notion that because Time-Warner does it, get
8 all we know about Comcast decisions that are
9 made jointly with Time-Warner, because
10 Time-Warner does it, we are justified in doing
11 it, too.

12 What I say is Time-Warner has
13 problems, DirectTV has some equity, Dish has
14 equity. AT&T is a new company. Everybody has
15 something that distinguishes them from Comcast
16 or makes them less than the ideal proxy.
17 Let's look at everybody. When you look at
18 everybody, the average is .

19 Moreover, the real important
20 comparison here -- this is a bit of a
21 distraction -- the real comparison is, how do
22 these MVPDs treat the three networks under

1 consideration here? Okay? And what I found
2 in my review is that in general -- okay? --
3 they are treated equally. Okay? Ask DirectTV,
4 Cox, Verizon, AT&T. You know, ask them where
5 they put these three networks. They put them
6 all together. Okay?

7 And that tells me a lot about how
8 those other MVPDs who are not conflicted the
9 way that Comcast is conflicted. They look at
10 these the same. They all should be clustered
11 around the same part of the dial, same tier,
12 same part of the dial.

13 Q Dr. Singer, why not exclude from
14 your analysis Dish and DirectTV since they have
15 equity, minority equity, positions in Tennis
16 Channel?

17 A Well, certainly Comcast would like
18 to, would like me to, exclude those because
19 those are the most important in-region rivals
20 that Comcast faces. They're carrying Tennis
21 Channel to a much higher degree. And it kind
22 of tilts the analysis in Tennis Channel's

1 favor.

2 I think there's a few things on
3 this equity. We heard testimony from Mr.
4 Solomon about the equity deal. My
5 understanding of the arrangements based on
6 that testimony is that although Tennis Channel
7 did grant equity to DirecTV and to Dish, it
8 did not have to as a condition of getting
9 carriage.

10 In other words, the way that I
11 understand Mr. Solomon is describing the
12 negotiations is that --

13 MR. CARROLL: Your Honor, I have
14 to interpose an objection here. I have let
15 this witness go on and voice all kinds of
16 opinions, but he's not competent I think we
17 can all agree to substitute his testimony for
18 a fact witness' testimony.

19 JUDGE SIPPEL: I was getting a
20 little bit edgy on that myself. I think we
21 had better stay away from that as to --

22 MR. PHILLIPS: Your Honor, if I

1 may?

2 JUDGE SIPPEL: Yes?

3 MR. PHILLIPS: I think what Dr.
4 Singer is trying to explain is the basis for
5 his decision not to exclude these two
6 companies from his analysis.

7 JUDGE SIPPEL: He is
8 characterizing the transcript reflecting Mr.
9 Solomon's testimony. And I am just not
10 altogether clear in my own head whether or not
11 that precisely does it. I mean, that was a
12 very, very tricky area we got into, if I
13 recall. And I don't want to get things
14 muddled up.

15 THE WITNESS: I can do it without
16 reference to the transcript or to that in
17 particular.

18 JUDGE SIPPEL: That's fine.
19 That's fine. Does that meet your concern?

20 MR. CARROLL: Very well. Thank
21 you, Your Honor.

22 THE WITNESS: Look, in general, it

1 is true that equity moves the dial. Okay?
2 There is no disputing that. But not all
3 equity deals are the same. Sometimes equity
4 is given for other consideration.

5 In particular, once the
6 penetration level is established, negotiation
7 is still ongoing. And you can either give
8 free service, you can give your service away
9 for free, you can give a launch support, which
10 I understand in the past has actually involved
11 transfers of money from the network to the
12 MVPD, or you can give equity.

13 And so it's important to
14 understand the particulars of the role that
15 equity played in each deal. And I think that,
16 as I understand the DirecTV and Dish deal,
17 equity was important, but it's not
18 dispositive.

19 DirecTV and Dish are the most
20 important competitors according to Comcast
21 itself for who Comcast competes against. If
22 you go to Comcast's website, Your Honor,

1 Comcast tries to compare its offerings to
2 those of DirecTV and to Dish. They also do
3 AT&T and Verizon as well.

4 JUDGE SIPPEL: Okay.

5 THE WITNESS: But DirecTV and Dish
6 are no doubt their most important in-region
7 competitors. And, for that reason, we can't
8 close our eyes to what DirecTV and Dish are
9 doing with respect to Tennis Channel. Okay?
10 Warts and all. We have warts. We could come
11 up with warts to disqualify everyone in this
12 list. Okay?

13 But given the nature of the equity
14 agreement in that -- in those particular
15 arrangements, all right, given the importance
16 that DirecTV and Dish play in terms of
17 competing against Comcast, you must include
18 DirecTV and Dish in my opinion in any
19 comparison of how Tennis Channel is being
20 carried in the marketplace.

21 JUDGE SIPPEL: Well, I understand
22 that, but let me ask this. I will stay with

1 that. I want to park it here for a minute.

2 But what about the fact -- aren't they fierce
3 competitors against each other?

4 THE WITNESS: They are fierce
5 competitors. Every in-region rival -- and
6 this is what makes them such a good
7 comparison. What you want, what we are trying
8 to do, if we could just abstract away, what we
9 are trying to do is we are trying to figure
10 out how would Comcast carry Tennis Channel if
11 it didn't have Golf and Versus? That's what
12 we're trying to do, right?

13 And so who can stand in the shoes
14 of Comcast? Who can play that role of this
15 made-up world that we are trying to create?
16 Who can do it? Right? And I suggest that we
17 should look at the very rivals who are
18 supplying the same customers in the same
19 geographic areas that Comcast is. That's the
20 place to begin, right?

21 AT&T is a great proxy. If you
22 look at the chart, AT&T is at . To

1 my knowledge, AT&T has no equity. Now, I
2 imagine Mr. Carroll will come up with another
3 reason for why we should --

4 MR. CARROLL: Your Honor, I object
5 to those kind of comments. It's just beyond
6 the bound.

7 JUDGE SIPPEL: Well, I will
8 sustain the objection.

9 MR. CARROLL: Thank you.

10 JUDGE SIPPEL: Yes. And I would
11 just as soon he does be a little cautious.

12 MR. PHILLIPS: Okay.

13 JUDGE SIPPEL: What you have got
14 is you have got two highly competitive
15 companies that are distributors, right, that
16 are on the board of directors of Tennis
17 Channel, which is a programmer, correct?

18 THE WITNESS: Correct.

19 JUDGE SIPPEL: All right. And, I
20 mean, they're sitting on the same board.

21 Between the 2 of them, they've got .

22 Now, why would they join forces at

1 when they hate each other? I don't know. It
2 seems kind of an unusual situation.

3 THE WITNESS: But they don't have
4 any control over Comcast carriage decisions.
5 They can't tell Comcast not to carry Tennis
6 Channel. This is Comcast.

7 JUDGE SIPPEL: Well, I know. I
8 understand. I'm not being -- I don't have
9 this thing, you know --

10 THE WITNESS: It would probably be
11 the --

12 JUDGE SIPPEL: It just strikes me
13 as strange.

14 THE WITNESS: Okay. If there were
15 some kind of commingling of interests such
16 that they had control over Comcast, it just
17 doesn't make sense. For me, the fact that
18 they have board memberships or votes on a
19 board and they were recusing themselves, it
20 just to me just doesn't have any role in this
21 analysis.

22 JUDGE SIPPEL: Recuse themselves?

1 THE WITNESS: Well, I'm not
2 allowed to speak to the testimony, but that's
3 what I thought.

4 JUDGE SIPPEL: Well, no. We've
5 heard, but we haven't had those two in here.
6 We haven't gotten their testimony. And I'm
7 not suggesting we should. And I don't think
8 what I'm saying is really directly relevant.

9 But I'm saying that why is it -- I
10 just ask myself and what -- why in the scheme
11 of things in the way the world works are two
12 people sitting on this board with
13 of the stock and --

14 THE WITNESS: It was and .

15 JUDGE SIPPEL: Well, I think about
16 , I thought. Anyway, whatever the number
17 is, --

18 THE WITNESS: Yes?

19 JUDGE SIPPEL: -- why are they
20 there together? Why don't you want two people
21 like that on your board? And who shares what
22 with whom?

1 I'm sorry. I'm wasting your time.

2 Go ahead. Go ahead.

3 MR. PHILLIPS: Let me move. I'm
4 sorry, Your Honor. That's fine, Your Honor.
5 I'm always happy to --

6 MR. CARROLL: Your Honor, could I
7 just ask how much longer the direct is going
8 to go? I would like to have a chance to start
9 the cross today. The direct is supposed to be
10 a summary of what is already in writing, and
11 we have been going out for about an hour and
12 a half.

13 JUDGE SIPPEL: Part of it is my
14 fault, but he did say that this was going to
15 take a little bit longer than the normal
16 direct.

17 MR. CARROLL: Okay.

18 MR. PHILLIPS: And I will try to
19 move it along, Your Honor. I am cutting
20 things out.

21 BY MR. PHILLIPS:

22 Q So let me go to the next topic for

1 you, Dr. Singer. Did you look at the effects
2 of the conduct and behavior that you observed
3 on Tennis Channel?

4 A Yes, I did.

5 Q What did you conclude?

6 A I concluded that Tennis Channel is
7 harmed in its ability as a result of the
8 conduct here to compete for programming, to
9 compete for advertisers, and to obtain
10 viewers.

11 Q Did you see any direct evidence of
12 how Comcast used the impact of putting Tennis
13 Channel on a sports tier?

14 A I did.

15 Q Could you describe that for me?
16 Well, actually, you know, what? Let me just
17 first distribute a memo to you.

18 A Okay.

19 Q It's Tennis Channel exhibit 34.
20 It's already in evidence.

21 A Tennis Channel exhibit 34 is in
22 evidence.

1 Q Dr. Singer, I've handed you Tennis
2 Channel exhibit 34, which is a document we
3 received from Comcast files. Have you seen
4 this before?

5 A Yes, I have.

6 Q Explain to me the significance it
7 had for you.

8 A Well, of course, one of my
9 assignments here was to make a determination
10 of the harm, if any, that Tennis Channel
11 suffers as a result of Comcast discriminatory
12 tiering policy. And it appears if I am
13 interpreting these documents correctly that
14 Comcast has actually beat its own calculation
15 of the harm to Tennis Channel as a result of
16 its tiering policy.

17 Q and what leads you to say that?

18 A So I'm looking at an e-mail from
19 Joseph Donnelly to Jeff Shell, Gavin Harvey,
20 and Marc Fein. And I could just read what I
21 think are the key portions, but it says,
22 "Here's a summary of the quick valuation we

1 did of Tennis Channel earlier this year under
2 Comcast and TTC," which I would interpret as
3 Tennis Channel, "assumptions.

4 "If we do a deal and the context
5 here is that the deal would involve equity for
6 greater carriage, we may need to upgrade this,
7 but it would suffice for the beginning of
8 crafting a deal with the USTA and value under
9 Comcast assumptions."

10 So your value if Comcast deploys
11 is . So, just to pause, my
12 understanding from the document is that the
13 deal on the table here would be an increase in
14 Comcast subscribers of . That is,
15 they go from wherever they were on a sports
16 tier back in December of 2006 up by

17 .
18 And they say that if we do that,
19 if we give them more carriage, then the value
20 of Tennis Channel goes to . Okay?

21 But this is the key, the next
22 bullet, "If Tennis Channel remains on Comcast

1 sports tier, the company has no value." Okay?
 2 I interpret that as an economist to mean quite
 3 literally that if we do nothing, if we leave
 4 Tennis Channel on the sports tier, -- okay? --
 5 we can ensure that this company is worthless.
 6 All right.

7 So to me what I am trying to
 8 figure out is not the absolute level of value
 9 in their current impaired state, but I am
 10 actually trying to figure out the delta. I am
 11 trying to figure out the harm, the incremental
 12 harm, the Tennis Channel suffers as a result
 13 of this discriminatory treatment. Right?

14 And Comcast has actually given us
 15 its own estimates of the harm, at least as of
 16 December of 2006.

17 Q Have you ever seen a document like
 18 this?

19 A Boy. I've seen some documents in
 20 my day I have to admit, but this one -- I've
 21 never seen a document like this in the context
 22 of a program carriage complaint where the

1 defendant has actually made its own estimation
2 of the harm that it is inflicting as a result
3 of its conduct.

4 MR. CARROLL: Your Honor, I object
5 to the characterization of the evidence that
6 he is not in a position to do that.

7 JUDGE SIPPEL: I will sustain
8 that. The evidence isn't complete enough to
9 make that kind of a conclusion.

10 BY MR. PHILLIPS:

11 Q Dr. Singer, can you explain to me
12 how carriage on Comcast sports tier would
13 deprive to this channel of in
14 value?

15 A Sure. And this is just Comcast's
16 estimation. I haven't endeavored to put a
17 number on the harm, but I have concluded based
18 on all the materials that I've read that that
19 number is significant, it's meaningful.

20 But at a first pass, here is what
21 goes wrong. The first thing is the obvious,
22 is that you forego all the license revenues

1 that would be associated with the additional
2 subscribers. Okay? And that's the easy one.

3 The next thing is also kind of
4 easy to see. It's that advertisers are paying
5 you based on how many eyeballs you're hitting.
6 So if you're shrunken, if your distributorship
7 is smaller relative to what it could be or
8 should be, you're going to get penalized on
9 that front as well.

10 Those are kind of the immediate
11 short-term harms. Now, there's intermediate
12 or long-term harms as well in the sense that
13 the conversations that are going on between
14 Tennis Channel and programmers according to
15 the documents that I reviewed suggest that
16 programmers, not just advertisers, but
17 programmers are reluctant to give Tennis
18 Channel the exclusive rights to distribute at
19 least the big ticket items because of its
20 limited footprint.

21 So now what happens is that Tennis
22 Channel and Versus are competing for certain

1 valuable programming rights. And Versus has
2 a leg up. And the only reason why it has a
3 leg up is because of the discriminatory
4 treatment.

5 Q I think you jumped ahead of my
6 next question for you, Dr. Singer. Let me go
7 back. I have a couple of more left. What do
8 you understand that Tennis Channel is seeking
9 by this lawsuit?

10 A I understand they are seeking
11 equal treatment to that of Comcast's similarly
12 situated networks Golf and Versus.

13 Q And does that mean the broadest
14 possible distribution level?

15 A No, no. Equal treatment doesn't
16 mean that the only resolution here is that
17 Comcast carry Golf, Versus, and Tennis on the
18 digital starter tier. Equal treatment could
19 also mean that Comcast carry all three on the
20 digital preferred tier. Equal treatment could
21 also mean that they carry all three on the
22 sports entertainment tier.

1 I'm not sure Tennis Channel would
2 be excited about that, but at least Versus
3 wouldn't have the leg up to that it has on
4 Tennis Channel to compete for programming
5 rights.

6 Q That was going to be my last
7 question for you, Dr. Singer, --

8 A I'm sorry.

9 Q -- which is, what difference does
10 it make if they're treated equally or not if
11 Tennis Channel is not achieving broader
12 distribution?

13 A Well, the difference that it makes
14 -- and I term your question from the
15 perspective of the Tennis Channel. I mean, I
16 just want to make sure. Under those three
17 scenarios of equal treatment that I laid out
18 -- well, let me just move you to this
19 question. I'm sorry.

20 What difference does the disparity
21 make is that so long as there is a disparity
22 between Versus and Tennis Channel or Versus

1 and Golf, Tennis Channel is impaired in its
2 ability to compete for programming.

3 The conversation with the rights
4 holder is much harder because the rights
5 holder can say Versus has the greater
6 footprint and they are willing to pay the same
7 or more. They have a bigger footprint. More
8 people are going to see my stuff.

9 So that is the fundamental problem
10 to me is this impairment in the ability to
11 compete for programming. And then the
12 question is, well, who cares? Who cares, you
13 know? Maybe it all ends up with Comcast. Who
14 cares?

15 You know, well, as a consumer, I
16 care, but I think policy-makers care. I think
17 that we care about preserving an environment
18 in which independent networks can thrive. We
19 care about the ability of content to move
20 freely and to get on to everyone's cable
21 company.

22 If all the content in the world

1 gets accumulated by an individual company,
2 then that company might have incentives to
3 withhold that content from its competitors.
4 And that is the world that we are concerned
5 about as economists, and that is why we care.

6 MR. PHILLIPS: Dr. Singer, thank
7 you very much.

8 THE WITNESS: Thank you.

9 JUDGE SIPPEL: Are you ready for
10 cross?

11 MR. CARROLL: Indeed.

12 JUDGE SIPPEL: I will stay until
13 6:30 if you can hang in there.

14 THE WITNESS: Okay.

15 JUDGE SIPPEL: Is that a problem?

16 THE WITNESS: No, no. I was going
17 to ask for a brief break, but can we do just
18 a minute? I can run --

19 JUDGE SIPPEL: No, no. Don't give
20 us any --

21 THE WITNESS: Oh, sorry.

22 JUDGE SIPPEL: We'll do a

1 five-minute. Is that okay?

2 MR. CARROLL: That is okay. I am
3 eager to go, but if the witness would like to
4 take five minutes, that's fine. I would just
5 ask him not to concur with his counsel during
6 the break.

7 THE WITNESS: That's fine.

8 JUDGE SIPPEL: Fair enough. Okay.
9 Go off the record.

10 (Whereupon, the proceedings went
11 off the record at 5:24 P.m. and came back on
12 at 5:31 p.m.)

13 ADMIN. JUDGE SIPPEL: You're set
14 to go?

15 THE WITNESS: Ready to go, Your
16 Honor.

17 ADMIN. JUDGE SIPPEL: Your
18 witness, sir.

19 MR. CARROLL: Thank you, Your
20 Honor. Mr. Singer, you're not here as a fact
21 witness, right?

22 THE WITNESS: I'm Dr. Singer --

1 MR. CARROLL: You prefer Dr.
2 Singer, forgive me. You're not here as a fact
3 witness, are you?

4 THE WITNESS: I am not.

5 CROSS-EXAMINATION

6 BY MR. CARROLL:

7 Q You're not here as a fact witness
8 because you weren't there at the meeting
9 between Mr. Bond and Mr. Solomon in 2009, for
10 example?

11 A Correct. Correct, I was not at
12 that meeting.

13 Q You weren't at any of the meetings
14 that are referred to in some of the documents
15 your Counsel showed you, correct?

16 A I was not at any of the meetings
17 in those documents, that those documents refer
18 to, no.

19 Q And, in fact, you weren't at any
20 of the meetings that are at issue in this
21 case, between my client and the client that
22 you're working for, correct?

1 A I was not in any of the meetings
2 in which any of these conversations occurred,
3 no.

4 Q And, therefore, you understand
5 it's wrong and not your role to try and
6 substitute your view of the facts for the
7 actual witnesses who lived through that. Do
8 you agree with that?

9 MR. PHILLIPS: Objection, Your
10 Honor. I don't know why it's considered
11 wrong.

12 ADMIN. JUDGE SIPPEL: Well, I'm
13 going to sustain the objection and without
14 getting into any of this, I've already
15 instructed the witness. And, so, who knows.

16 BY MR. CARROLL:

17 Q Now you're an experienced expert
18 who has testified many times as an expert,
19 correct?

20 A Correct.

21 Q And one of the things an expert is
22 supposed to be when you come into a court and